

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: September 26, 1997

Case No. **95 INA 477**

In the Matter of:

ROBERT GOSSETT,
Employer

on behalf of

BEATA GROCHOWSKA,
Alien

Appearance: E. S. David, Esq., of New York, New York.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of BEATA GROCHOWSKA (Alien) by ROBERT GOSSETT (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 10, 1993, Employer, Robert Gossett, filed for labor certification on behalf of the Alien, Beata Grochowska, to fill the position of "Housekeeper/live-out." AF 09. Employer's experience requirement was three months. After Employer received applications from thirteen U.S. workers, he reported recruiting results in a letter dated August 26, 1993, and stated the reasons for rejecting one or more of the U. S. workers who applied for this job. The letter noted inter alia that Ita D. Luckain was rejected because she arrived for the interview thirty minutes late, stating that promptness was regarded as essential. Other applicants were rejected for other reasons. AF 58.

In the CO's Notice of Findings (NOF) of December 19, 1994, the CO questioned the Employer's rejection of three of the U.S. applicants, Ms. Luckain, Adrienne Rogers, and Gloria Leon. The CO questioned Employer's rejection of Ms. Luckain on the basis of arriving thirty minutes late for the interview, since she advised the local office that she arrived at Employer's residence at 4:25 PM for the 5:00 PM interview. By way of Rebuttal, the Employer was required to document the lawful, job related reason for rejection of this U. S. worker. AF 78-80.

In Rebuttal, Employer said the interview with Ms. Luckain was scheduled at 4:00 PM, on June 25, 1993, and that she arrived at 4:30 PM. Employer said the interview was not to be held at 5:00 PM, as the applicant stated. The Employer also reiterated that timeliness is key in its business. The Employer also stated reasons for rejection of the applicants Rogers and Leon. AF 85B.

In the Final Determination of January 30, 1995, the CO accepted Employer's rebuttal evidence regarding the rejection of Ms. Rogers and Ms. Leon. The CO found, however, that Employer's rebuttal evidence did not establish that Ms. Luckain was lawfully rejected, as being late for an interview is not a lawful, job related reason for rejecting an applicant under the Act and regulations. The CO explained that the Employer failed to provide information as to applicant's reason for being late for the interview, e.g., a transportation problem or other cause. The CO concluded that the Employer had not proven lawful, job related reasons for rejecting Ms. Luckain and denied the

application for labor certification for this reason. AF 84-85A.

On February 3, 1995, Employer appealed from the denial of labor certification. AF 88. As grounds for appeal the Employer disagreed with the CO's finding that being late for an interview is a lawful job-related reason for rejecting Ms. Luckain, and reiterated the Rebuttal statement that the time of the job interview in the Employer's date book was 4:00 PM. AF 88.

Discussion

The Employer's application and the Appellate File indicate that the central issue is the application of 20 CFR § 656.21(b) (6), which requires an employer to prove that the rejection of U. S. workers who applied for a job for which that employer seeks Alien Labor Certification was based solely on reasons that are lawful and job related. This implements the further provisions of 20 CFR § 656.20(c)(8) that the job must clearly be open to any qualified U. S. worker.

In this NOF the CO expressly directed the Employer to prove the facts on which employer relied in rejecting Ms. Luckain on grounds that she was late for the interview, based on the job applicant's statement that she arrived at 4:25 PM for an interview that was scheduled for 5:00 PM. Employer's response is that the interview was, in fact, scheduled for 4:00 PM. The Appellate File indicates that Employer's rebuttal did not include documentation or any other evidence to prove that the time of the interview was 4:00 PM and not 5:00 PM. The Employer did not, for example, offer the evidence of a date book or appointment calendar, or a copy of a letter to the job applicant notifying her for the date and time of the interview. As the followup questionnaire to Ms. Luckain asserted that she had arrived early for the interview, it is found (1) that the CO properly placed the burden on the Employer to substantiate the allegation that the U. S. worker's applicant was late and (2) that the Employer failed to comply with the CO's explicit demand for credible persuasive evidence supporting the Employer's response. **Annette Gibson**, 88 INA 396 (June 20, 1989).

Notwithstanding the CO's discussion and directions in the NOF, the Rebuttal did not state whether or not the Employer had discussed this late arrival with Ms. Luckain to determine if the job applicant was consistently tardy or whether her tardiness for the interview merely reflected a one-time problem that arose from transportation problems or confusion about the time Employer had designated. The Employer's Rebuttal did not provide evidence to support the inference that the applicant's tardiness for the interview was a consistent practice, even though Ms. Luckain had furnished references to verify her suitability for the position. Instead, the Employer relies on the unsubstantiated assertion

that the applicant was late for the interview and the arbitrary conclusion that such tardiness indicates Ms. Luckain could not perform the job for which she is otherwise qualified, since timeliness is essential to this position.

Because the Employer did not demonstrate that the applicant was late for the interview and failed to prove that such tardiness demonstrates the existence of a difficulty in employing this worker, we agree with the CO's finding that the Employer failed to establish a lawful, job-related reason for rejecting the application of this U. S. worker, Ms. Luckain, as 20 CFR § 656.21 (b)(6) requires. Accordingly, we find certification was properly denied by the CO and the following order will enter.

ORDER

The Certifying Officer's denial of Employer's application for alien labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 477

ROBERT GOSSETT, Employer
BEATA GROCHOWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: September 11, 1997